UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LEWIS FOODS OF 42ND STREET, LLC, A McDONALD'S FRANCHISEE, AND McDONALD'S USA, LLC, JOINT EMPLOYERS, et al.

and

FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.

Cases 02-CA-093893, et al.
04-CA-125567, et al.
13-CA-106490, et al.
20-CA-132103, et al.
25-CA-114819, et al.
31-CA-127447, et al.

ORDER GRANTING AND DENYING IN PART THE PETITIONS TO REVOKE McDONALD'S USA, LLC'S SUBPOENAS *DUCES TECUM* SERVED UPON THE CHARGING PARTIES AND KENDALL FELLS

The Consolidated Complaint and Notice of Hearing in this matter alleges that McDonald's USA, LLC ("McDonald's"), as a joint employer with its franchisees (the "Respondent Franchisees" or "Franchisee Respondents"), committed various violations of Sections 8(a)(1) and (3) of the Act in response to their employees' protected concerted and union activities. McDonald's and the Franchisee Respondents filed Answers denying the Consolidated Complaint's material allegations.

McDonald's served Service Employees International Union ("SEIU"), and the Fast Food Workers Committee and other Charging Parties[1] with Subpoenas *Duces Tecum*. Subsequently, the Charging Parties filed Petitions to Revoke, and General Counsel filed a consolidated Opposition. McDonald's also served a Subpoena *Duces Tecum* on Kendall Fells, and employee of SEIU, and SEIU filed a Petition to Revoke.

For the following reasons, I find that McDonald's Subpoenas are overbroad, and require the production of material which lacks relevance to the issues raised by the

[1] The Charging Parties Fast Food Workers Committee, Pennsylvania Workers Organizing Committee, a project of the Fast Food Workers committee, Workers Organizing Committee of Chicago, Los Angeles Organizing Committee, and Western Workers Organizing Committee, all served with Subpoenas *Duces Tecum* by McDonald's, will be collectively referred to as the "Workers Committees."

Consolidated Complaint's allegations. I also find that the production of documents as required by McDonald's Subpoenas would have a chilling effect on the employees' exercise of their rights protected under Section 7 of the Act. However, as discussed below, a subset of the materials sought are relevant to: (i) the protected concerted and union activities of the individuals named as discriminatees in the Consolidated Complaint; (ii) the Consolidated Complaint's other allegations of retaliatory conduct; and (iii) the General Counsel's contention that McDonald's coordinated or directed the response of its franchisees to the Charging Parties' campaign in a manner that tends to prove that McDonald's and the Franchisee Respondents are joint employers. As a result, the Charging Parties' Petitions to Revoke are granted and denied in part.

Under Section 102.31(b) of the Board's Rules and Regulations, documents sought via subpoena should be produced so long as they relate to any matter in question, or can provide background information or lead to other potentially relevant evidence. See also *Perdue Farms*, 323 NLRB 345, 348 (1997), *aff'd. in relevant part*, 144 F.3d 830, 833-834 (D.C. Cir. 1998) (information need only be "reasonably relevant"). Under Rule 26(b)(1) of the Federal Rules of Civil Procedure, which the Board has referred to for guidance in deciding such issues, information sought in a subpoena must only be "reasonably calculated to lead to the discovery of relevant evidence." See *Brinks, Inc.*, 281 NLRB 468 (1986).

A. The Consolidated Complaint and the Parties' Contentions

As I have discussed in previous Orders, two separate entities constitute joint employers of a single group of employees where the evidence establishes that they "share or codetermine those matters governing the essential terms and conditions of employment," or "meaningfully affect[]" employment issues such as hiring, firing, discipline, supervision and direction of work. *CNN America, Inc.*, 361 NLRB No. 47, at p. 3 (2014), quoting *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transportation*, 269 NLRB 324, 325 (1984); see also *Computer Associates Int'l*, 332 NLRB 1166, 1167-1168 (2000). The Board and the courts have also considered the putative joint employer's involvement in determining the number of available jobs and setting wage rates and total overtime hours, and its participation in the collective bargaining process, as well as job descriptions, quality improvement, training, staffing levels, and workers compensation insurance. See *CNN America, Inc.*, 361 NLRB No. 47, at p. 3, fn. 7; see also *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991); *Moderate Income Management Co.*, 256 NLRB 1193, 1194 (1981); *Pacific Mutual Door Co.*, 278 NLRB 854, 858-859 (1986); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162 (1989). In addition, General Counsel contends here that McDonald's coordinated or directed the Franchisee Respondents' conduct in connection with the employees' protected and union activities in a manner which tends to prove that McDonald's "share[s] or codetermine[s] those matters governing the essential terms and conditions of employment," or "meaningfully affects" employment issues at the Franchisee Respondents' locations. Thus, General Counsel argues that McDonald's response to

the employees' activities at the Franchisee Respondents' locations, and to other aspects of the Charging Parties' organizing campaign, is relevant on this basis.[2]

McDonald's articulates a convoluted theory based upon this particular assertion of General Counsel's in order to argue that the vast array of information it seeks is relevant under the rubric of the established joint employer analysis. McDonald's argues that the Charging Parties' campaign, comprised in part of the employees' protected concerted and union activities, in fact constituted an assault against its brand.[3] McDonald's contends in its Opposition that pursuant to the joint employer theory advanced by the General Counsel, McDonald's had the right to engage in coordinated actions to protect the integrity of its brand. Therefore, any coordination or direction of the Respondent Franchisees' activities in response to Charging Parties' purported "brand attack" does not constitute evidence of a joint employer relationship. McDonald's apparently contends that the materials it seeks via Subpoena from the Charging Parties and the Non-Parties are necessary for it to prove that the Charging Parties' activities constituted an actual as opposed to a merely perceived "brand attack." An actual assault on its brand would, according to McDonald's depiction of General Counsel's position, divest any evidence of its coordinated response of relevance in the context of the joint employer analysis.

At the hearing, however, General Counsel disavowed McDonald's characterization of his position, and the interpretation of the case law on which it is based. General Counsel stated that in previous cases addressing the alleged joint employer status of a franchisor and franchisee, the Board had found that certain aspects of the the franchisor's control over franchisee operations were intended to ensure a standardized product or customer association, and were therefore not pertinent to joint employer status. For example, in *Love's Barbeque Restaurant*, the ALJ found that materials prescribing the recipes for food preparation and the sizes and portions of the menu items offered ultimately did not tend to establish joint employer status, as they "relate to the image, the historical image, of [the franchisor's] chain," as opposed to labor relations. 245 NLRB 78, 120 (1979). However, General Counsel stated that he only interpreted the cases as holding that in those particular instances such evidence did not tend to establish joint employer status. General Counsel stated that he did not glean from the Board's previous joint employer cases involving franchise relationships a general rule exempting everything related to the franchisor's "brand

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[2] McDonald's raised nine Affirmative Defenses in its Answers. McDonald's contends that the Complaints contained inadequate conclusory allegations regarding joint employer status which provided it with insufficient notice and deprived it of procedural due process. McDonald's also contends that the NLRB lacks authority to depart from the common law of agency in its joint employer analysis and that, pursuant to *Capitol EMI Music*, 311 NLRB 997 (1993), McDonald's neither knew nor should have known of the Franchisee Respondents' unlawful conduct. McDonald's other Affirmative Defenses assert that the General Counsel abused his prosecutorial discretion and deprived it of due process in the consolidation of charges, that the NLRB lacks jurisdiction, that the unfair labor practices were untimely pursuant to Section 10(b) of the Act, and that an inherent statutory conflict between the Lanham Act and the National Labor Relations Act precludes the NLRA's applicability.

[3] McDonald's apparently does not contend that the activities of the employees at the Respondent Franchisee locations lost the protection of the Act on this basis.

identity" or other intangibles from the purview of the National Labor Relations Act. Therefore, McDonald's characterization of the position of General Counsel from which it attempts to construct its "brand assault" theory is apparently inaccurate.

In addition, the distinction McDonald's seeks to draw between an actual and perceived attack on its brand – which it purportedly requires the information sought in its Subpoenas to elucidate – is effectively meaningless given the overall joint employer analysis. In the context of General Counsel's argument, the salient information is the evidence pertaining to McDonald's coordination or direction of its franchisees' activities, in and of itself, in response to the employees' protected concerted and union activities and the other activities of the Charging Parties. Evidence of McDonald's conduct in this regard either will or will not tend to establish that it shares, co-determines, or meaningfully affects the terms and conditions of employment at the Respondent Franchisee locations, regardless of the manner in which McDonald's construed the Charging Parties' motivations, let alone the Charging Parties' actual intent.[4] Furthermore, the motivations of parties engaged in protected concerted or union activity are irrelevant when it is the employer's response that is the matter "in question" in the case. For example, the Board has squarely held that employees' motivation for engaging in protected concerted or union activity is completely irrelevant in the context of an allegation that their employer retaliated against them on that basis. See *Bettie Page Clothing*, 359 NLRB No. 96, at p. 1-2 (2013), 361 NLRB No. 79 (2014) (ALJ properly rejected employer's "conspiracy theory" that employees allegedly discharged in retaliation for their protected concerted activity "schemed to entrap their employer into firing them").[5] I find McDonald's "brand assault" theory analogous in this respect to the "entrapment" theory asserted by the employer and rejected by the Board in *Bettie Page Clothing*. Thus, the motivations of the SEIU and the Charging Party Workers Committees are irrelevant to whether the named discriminatees were engaged in protected concerted or union activity, and whether McDonald's and the Franchisee Respondents, as a joint employer, took certain adverse employment actions against them as a result. The Charging Parties' motivations are also irrelevant to whether McDonald's generally coordinated or directed the conduct of the Franchisee Respondents in connection with the Charging Parties' campaign.[6]

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[4] Indeed, the Fast Food Workers Committee and other Charging Parties argue that McDonald's arcane "brand assault" theory was devised for the express purpose of justifying the sweeping inquiry into the Charging Parties' and other non-parties' activities being attempted via the Subpoenas. See *Flaum Appetizing corp.*, 357 NLRB No. 162, p. 5 (2011).

[5] In addition, there is no equitable "unclean hands" defense cognizable under the National Labor Relations Act. See *Staffing Network Holdings*, 362 NLRB No. 12, p. 11 (2015); *Woodworkers Local 3-433 (Kimtruss Corp.)*, 304 NLRB 1 (1991).

[6] Nor is there any relevance to the other accusations of misconduct and nefarious intent on the part of the Charging Parties and other non-parties contained in McDonald's Opposition, given the Consolidated Complaint's allegations. Again, it is the conduct of McDonald's and the Franchisee Respondents that is at issue here; SEIU and the other Charging Parties are not respondents in this matter. Although McDonald's Opposition is replete with claims of misconduct on the part of SEIU, the Workers Committees, and non-party New York Communities for Change, Inc., no charges alleging that any of them violated Section 8(b) of the Act were ever filed.

Charging Parties contend that given the overbreadth of the paragraphs contained in the Rider to the Subpoenas, the irrelevance of the information sought, and the potential chilling effect on employees' protected concerted and union activities, the Subpoenas should be revoked in their entirety. However, certain limited aspects of the information sought by McDonald's are relevant. The protected concerted and union activities of the individual employees named in the Consolidated Complaint are relevant to the allegations that McDonald's and the Franchisee Respondents retaliated against them in violation of Sections 8(a)(1) and (3). In addition, the protected concerted and union activities of employees at McDonald's restaurants and the Charging Parties' campaign are relevant to the Consolidated Complaint's more general allegations of conduct in retaliation for those activities, and to General Counsel's contention that McDonald's coordinated or directed the response of the Franchisee Respondents to those activities in a manner evincing joint employer status. However, I find that, with the exception of the protected concerted and union activities of the alleged discriminatees, only information which would have actually imparted knowledge to McDonald's and the Franchisee Respondents of the Charging Parties' campaign and the activities of employees in connection with the campaign is pertinent. By contrast, information regarding the Charging Parties' internal affairs, operations, strategies, and activities not disclosed to McDonald's or to the public is not germane to the alleged violations committed by McDonald's and the Franchisee Respondents, or to any coordination by McDonald's of the Franchisee Respondents' actions, in response. Thus, I find that the only information sought by McDonald's relevant to the Consolidated Complaint's allegations concerns the following: (i) the actual protected concerted and union activities engaged in by the individual employees allegedly subject to retaliation by McDonald's and the Franchisee Respondents; (ii) the actual activities engaged in by the Charging Parties and the employees to which, according to General Counsel, McDonald's and the Franchisee Respondents effected a coordinated response; and (iii) any other information that would have provided McDonald's and the Franchisee Respondents with knowledge of the Charging Parties' campaign, and the employees' protected concerted and union activities.

Charging Parties argue that McDonald's Subpoenas should be revoked in their entirety, and that McDonald's should be required to formulate more circumscribed demands for information in new Subpoenas and effect service again. However, in order to increase the efficiency of the hearing process and conserve resources for all concerned, I will instead require the production by Charging Parties of evidence relevant to the issues raised by the Consolidated Complaint in this Order.

I now turn to the specific categories of information which McDonald's Subpoenas would require that the Charging Parties produce.

B. Information Sought Regarding Charging Parties' Operations

McDonald's Subpoenas to the Charging Parties require the production of certain information regarding their internal operations, structure, and finances. For example,

the Subpoena served on SEIU seeks information regarding the job duties and compensation of individuals employed by or associated with SEIU (¶ 17).[7] The Subpoenas to the Workers Committees require the production of documents regarding the creation of these entities, their organizational structure, constitution and by-laws, government filings, and finances (¶¶ 1-7). The Subpoenas also seek information regarding any financial relationship between the Charging Parties (SEIU Subpoena ¶ 24; Workers Committees Subpoenas ¶ 6). Because the Charging Parties' inception, operations, and motives are irrelevant to the allegations of retaliation or the joint employer issue for the reasons discussed above, these paragraphs seek immaterial information. I note that the Board has in the past revoked subpoenas seeking general information regarding the organization, structure, and finances of unions when not directly related to a matter "in question" in the case. *Burns Security Services*, 278 NLRB 565, 565-566 (1986) (revoking subpoena requiring the production of documents regarding union's general operations to purportedly establish that union was affiliated with a non-guard labor organization, and could not be certified pursuant to Section 9(b)(3)). As a result, the Charging Parties' Petitions to Revoke these paragraphs are granted.

C. Information Sought Regarding Charging Parties' Organizing Strategy and Activity

McDonald's Subpoenas to the Charging Parties also seek information regarding their overall organizing strategies and tactics (SEIU Subpoena ¶¶ 13-16, 18-23; Workers Committees Subpoenas ¶¶ 11, 19). The Subpoenas further require the production of documents pertaining not only to McDonald's and its franchisees, but to "the Fast Food Campaign or other similar activity," and any "franchised and/or fast food businesses" (SEIU Subpoena ¶¶ 4, 7, 9,-12, 18-23, 31; Workers Committees Subpoenas ¶¶ 9-11). Such information is irrelevant to the Consolidated Complaint's allegations that McDonald's and the Respondent Franchisees violated Sections 8(a)(1) and (3) of the Act.[8] See *Interstate Builders*, 334 NLRB 835, 841-842 (2001), rev'd. in part 351 F.3d 1020 (10th Cir. 2003) (revoking subpoena seeking materials regarding union's internal operations and "organizing practices or 'salting' program" as irrelevant to the alleged discriminatory refusal to hire the employees in question). In addition, for the reasons discussed above, these materials have no relevance to the contention that McDonald's coordination or direction of its franchisees' conduct in response to the

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[7] McDonald's also served a separate Subpoena *Duces Tecum* on Kendall Fells, which SEIU petitioned to revoke. Fells has apparently been an employee of SEIU since 2006, and his activities in connection with the campaign and the protected concerted and union activities of employees at the Franchisee Respondent's locations, if any, took place within the scope of that employment. As a result, I find that McDonald's Subpoena served upon Fells is cumulative and duplicative of its Subpoena served on SEIU pursuant to Federal Rule of Civil Procedure 26(b)(2)(C)(i). SEIU's Petition to Revoke it is therefore granted.

[8] McDonald's contends that these paragraphs do not seek materials regarding organizing strategy, because no petition for a representation election has been filed. However, the actual filing of a petition is not necessary in order for organizing, or concerted and union activity protected by Section 7, to have taken place.

employees' protected concerted and union activities evinces a joint employer relationship. I therefore find that these materials are not pertinent to the issues raised by the Consolidated Complaint's allegations, and the Charging Parties' Petitions to Revoke these paragraphs are granted.

D. Information Sought Regarding Protected Concerted and Union Activities

McDonald's Subpoenas to the Charging Parties also encompass the production of materials regarding the protected concerted and union activities of employees at the Franchisee Respondents' locations. I find that such materials – to the extent that they reflect activities of employees which actually occurred and are not internal documents reflecting overall strategy – are relevant to the Consolidated Complaint's allegations. However, it is well-settled that where information sought by subpoena or in testimony would disclose the identities of employees engaged in union activity who are not named as alleged discriminatees in a complaint, their confidentiality interests, which are of "overriding concern," must be balanced against the Respondent's right to conduct a comprehensive cross-examination. *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1995); *see also Manorcare Health Services-Easton*, 356 NLRB No. 39, at p. 33-35 (2010), *enf'd*, 661 F.3d 1139 (D.C.Cir. 2011). Although some paragraphs contained in the Riders to the Subpoenas specifically state that the names of employees engaged in protected activity should not be disclosed in the documents produced, other, broader paragraphs contain no such limitation. I find that the potential chilling effect of disclosure on the protected concerted activity of employees not named in the Consolidated Complaint outweighs the necessity of the information sought to McDonald's defense.

E. Conclusion

For all of the foregoing reasons, the Petitions of Charging Parties SEIU and the Workers Committees to Revoke McDonald's Subpoenas *Duces Tecum* are granted except as set forth below. The Petition to Revoke McDonald's Subpoena *Duces Tecum* served on Kendall Fells is granted. The Charging Parties are ordered to produce the following documents, to the extent that they do not reflect organizing strategy or contain privileged material, for the period September 1, 2012 through December 31, 2014. Documents shall be redacted in all cases to omit information identifying any employees not named as alleged discriminatees in the Consolidated Complaint.

1. All documents regarding the actual protected concerted or union activities of the individuals named as alleged discriminatees in the Consolidated Complaint.

2. All documents showing the public activities engaged in by the Charging Parties or by employees of McDonald's and/or its franchisees in connection with

the Charging Parties' campaign regarding the terms and conditions of employment for employees at restaurants of McDonald's and/or its franchisees. Material involving internal matters and deliberations, operations, and activities not disclosed to the public, McDonald's or its franchisees, need not be produced.

3. All documents made available to McDonald's, its franchisees, or the public in connection with the Charging Parties' campaign regarding the terms and conditions of employment for employees at restaurants of McDonald's and/or its franchisees.

Dated: New York, New York
April 9, 2015

Lauren Esposito
Administrative Law Judge

FACSIMILE COVER SHEET

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From: Lauren Esposito, Administrative Law Judge

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Pages: 27 (including 2 cover pages)

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Case No. 02-CA-93893 et al

"Orders on Miscellaneous Hearing Matters"

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-DC JUDGES -

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